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**Speech for Irwin Cotler,
Minister of Justice and Attorney General of Canada**

**THE CONSTITUTIONAL REVOLUTION, THE COURTS,
AND THE PURSUIT OF JUSTICE**

**Canadian Bar Association
Vancouver , British Columbia
15 August 2005**

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Introduction

I am delighted to be here to participate in the common cause which brings us together – the pursuit of justice and the struggle against injustice. May I express my appreciation to the organizers of this legal conference, and to the Canadian Bar Association with whom we have been engaged in a long-term partnership in a common cause

May I begin by reaffirming today my first words, spoken upon being sworn in as Minister of Justice and Attorney General of Canada some 20 months ago: that I will be guided in my work by one overarching principle – the pursuit of justice – and within that, the promotion and protection of equality; equality not just as a foundational section in the *Canadian Charter of Rights and Freedoms* , but equality as an organizing principle for the building of a just society; and the promotion and protection of human dignity, for the building of a society that is just, compassionate and humane.

In that context – and pursuant to that philosophy, I shared with you last year four priorities – indeed principles – that would underpin the pursuit of justice. What I would like to do this year is continue that dialogue, report upon the actions taken and the progress made in respect of these priorities – an accountability reporting if you will – and then address the main theme of my remarks today, which is that of “The Constitutional Revolution, The Courts, and The Pursuit of Justice.”

The four priorities – and corresponding underlying principles – which have underpinned our work include:

1 - The relationship between Security and Rights

As I stated last year, and it bears recalling today, the **first priority is the relationship between security and rights** - where the underlying principle here is that there is no contradiction in the protection of security and the protection of human rights - that counter-terrorism itself is anchored in a twofold human rights perspective.

First, that transnational terrorism constitutes an assault on the security of a democracy and the most fundamental rights of its inhabitants: the right to life, liberty, and security of the person.

Accordingly, counter-terrorism is the promotion and protection of the security of a democracy and fundamental human rights in the face of this injustice—the protection, indeed, of human security in the most profound sense.

At the same time, and this is the second and related human rights perspective imbedded in the relationship between counter-terrorism and human rights, the enforcement and application of counter-terrorism law and policy must always comport with the rule of law. Minorities must never be singled out for differential and discriminatory treatment. Torture must always and everywhere be prohibited. Counter-terrorism must not undermine the very human security we seek to promote and protect by that counter-terrorism.

This principled approach to the relationship between security and rights has guided my work in a world which, as *Le Monde* recently characterized it, is one of *Le terrorisme sans frontières – Terrorism Without Borders*. And indeed, I have advanced this position and principle in every bilateral discussion with my Ministerial counterparts, and in every international forum in which I have participated – be it the G8, the Council of Europe or the Middle East. It has been context and content for my appearance before both the House and Senate parliamentary committees now engaged in a review of the *Anti-terrorism Act*, and I want to commend the CBA for its considered and comprehensive contribution to this parliamentary review. We also launched a cross-cultural roundtable in March 2005 to engage our cultural communities and visible minorities in an ongoing dialogue on the *Anti-terrorism Act* and its impact; and I continue to meet regularly with ethno-cultural and visible minority groups with this principled approach to security and human rights at the core of our encounters.

2 – The second priority: the protection of the most vulnerable amongst us.

The test of a just society – one organized around the principles of equality and human dignity – is how it treats the most vulnerable amongst us: children, women, refugees, aboriginals, and minorities.

In that connection, I am delighted that the first legislative initiative in the parliamentary session since we last met was a bill “to Protect Children and Other Vulnerable Persons” from sexual exploitation, violence, abuse and neglect. The bill received Royal Assent last month. We also launched in that connection and on a national level the expansion of the already successful Manitoba based Cybertip.ca – an online tip line for reporting child exploitation.

Recently, I tabled the first ever legislative initiative to criminalize the scourge of trafficking – the new global slave trade and the fastest growing international criminal industry – as part of our anti-trafficking strategy organized around the prevention of trafficking to begin with; the protection of the victims of trafficking; and the prosecution of the perpetrators.

In the matter of Aboriginal justice, we sought to craft a strategic advocacy framework organized around what I have come to call the seven Rs:

- Recognition of the Aboriginal peoples as the original inhabitants of our country;
- Respect for the distinguishable constitutional status as set forth in the *Charter of Rights* and the Constitution of Canada;
- Redress for past wrongs as in the Indian Residential Schools tragic legacy;
- Responsiveness in terms of the duty of the Crown to be responsive to Aboriginal rights and sensibilities as set forth, *inter alia*, in the recent Taku River and Haida Supreme Court decisions;
- Representation – in a dual sense – to address and redress the over-representation of Aboriginal peoples as both victims and offenders in the criminal justice system; and the under-representation of Aboriginal persons as court workers, prosecutors and judges in the justice system;

- Reconciliation – if we achieve the first five Rs, this will be the basis for reconciliation;
- And finally renewal, a renewed relationship based on mutual trust, respect and genuine reconciliation.

I am delighted, therefore, that an historic political accord was signed with the Assembly of First Nations in June 2005 – which national Chief Phil Fontaine appropriately called “one for the ages” – to move towards a fair, just and lasting resolution of the Residential School legacy – and the Honourable Frank Iacobucci, who is here, was appointed as a government representative to lead these negotiations.

Finally, on this theme of protecting the vulnerable, I hosted a meeting with representatives of the legal community, including the Canadian Bar Association, in June 2005, where I reaffirmed my call – first enunciated at last year’s CBA meeting for the establishment of a pro bono movement – a pro bono culture – on behalf of the public good. I want to commend the CBA for your initiatives in this regard.

3 - Combating racism, hatred and discrimination

Racism, hate speech and hate crimes against identifiable groups constitute an assault on the inherent dignity and worth of each individual, on the rights of minorities to protection against group vilification, and on our own multicultural democracy. Accordingly, we are developing a set of justice initiatives – both domestically and internationally – to combat racism, hate speech and hate crimes. In a word, we envisage a society in which there will be no sanctuary for hate and no refuge for bigotry.

In that context – and with that purpose in mind – we launched Canada’s first ever National Action Plan Against Racism. I also announced a 13-point National Justice Initiative Against Racism and Hate. And last month, I went to Strasbourg to sign an International Protocol to the European Convention on Cybercrime to combat racism and hate-motivated crimes committed through the Internet – to counter Internet hatred and bias, as set forth in our National Justice Initiative.

4 – Combating impunity and mass atrocity

This involves a tripartite strategy beginning with the notion that the best protection against mass atrocity is the prevention of it to begin with. If, however, prevention is unavailing, if states are unable or unwilling to prevent mass atrocity or if they themselves are the perpetrators of such crimes, there emerges an international responsibility to protect. I have sought to articulate the nature and imperative of that responsibility in our bilateral encounters and international fora, particularly as it involves the genocide by attrition in Darfur .

The critical and final component in this tripartite strategy is accountability, or more specifically, the importance of bringing war criminals to justice, as reflected in our support for the U.N. Security Council Resolution to refer the perpetration of mass atrocities in Darfur to the International Criminal Court.

So much for a status report on the progress on the implementation of the four justice priorities that I shared with you last year - these remain a focal point on our justice agenda and will inspire our advocacy in the future.

May I turn now to the theme of the “Constitutional Revolution, The Courts and The Pursuit of Justice,” wherein I will identify and share with you three emergent principles and priorities since last year’s CBA meeting, and that collectively comprise our agenda for justice.

The Constitutional Revolution: Promoting and Protecting the *Charter of Rights and Freedoms*

One of the most compelling principles and priorities on the justice agenda – I believed it as a law professor but can appreciate it dramatically now as a Minister of Justice and Attorney General of Canada – is the promotion and protection of the *Charter of Rights and Freedoms* in general, and the equality rights and anti-discrimination provisions in particular.

As we commemorate the 20th anniversary of the coming into effect of the equality rights provision in the *Charter*, we need to appreciate the transformative impact of the *Charter of Rights* – the equality rights principle – not only on our laws but on our lives; not only on how we litigate but on how we live.

For we have moved from being a parliamentary democracy to being a constitutional democracy; from judges being the arbiters of legal federalism to judges being the guarantors of human rights, because Parliament vested in them the authority to protect our fundamental rights and freedoms; from individuals and groups, who in the pre- *Charter* universe were passive bystanders to legal federalism, to now being rights holders – rights claimants – with a panoply of rights and remedies that would not have even been justiciable some 23 years ago, the whole engaging a triologue between Parliament, the courts and the people -- as found expression in the discussion, debate and adoption of the same sex legislation.

Indeed, this legislation is itself anchored in two foundational *Charter* principles – equality rights, and, within that, extending civil marriage to gays and lesbians while not affecting religious marriage or taking away the rights of anyone else; and freedom of religion and, within that, no religious official being compelled to perform a same sex marriage if it is contrary to their religion or belief. And for greater certainty we adopted a generic amendment to the effect that no benefit may be withdrawn and no obligation or sanction may be imposed, on any person or organization, by reason of the fact that they exercise their right to freedom of conscience and religion under the Canadian *Charter of Rights and Freedoms*.

Moreover – and this is less known though not less important – this Constitutional Revolution in rights and remedies has had a transformative impact on the roles and responsibilities of the Minister of Justice and Attorney General of Canada as a trustee of the rule of law including:

- Certifying that every proposed law and policy comports with the *Charter of Rights and Freedoms*.
- Counselling departments and agencies of government – in my capacity as Chief Legal Advisor to Government – of our fidelity to the *Charter*, i.e., creating a culture of respect in Government for rights and freedoms.
- Promoting compliance with our international law obligations, where international law “is a relevant and persuasive authority” in the interpretation of the *Charter*.
- Directing that our interventions before the courts comport with the *Charter*.
- Ensuring that prosecutions are carried out in accordance with *Charter* obligations.
- Assessing applications for review of wrongful convictions in light of *Charter* obligations.
- Ensuring that mutual legal assistance and international legal cooperation, e.g., extradition, comports with the *Charter*.
- Parliamentary/public role – promoting awareness of the *Charter*.

In a word, fidelity to the constitution – to the rule of law – to the Canadian *Charter of Rights and Freedoms* – must be the canon and commitment by which we stand, and is the canon and

commitment which will inform my obligations as Minister of Justice and Attorney General of Canada.

2 - The appointment of judges and the judicial appointments process.

If you had asked me last year about my priorities, I would not have included judicial appointments amongst them. But I have learned that this is a critical part of the administration of justice in this country. This is a legacy issue, and this will live on long after those of us who have the temporary stewardship of this position are no longer here.

Accordingly, I was delighted to be able to participate in the appointments of two outstanding judges to the Supreme Court of Canada – Justices Rosalie Abella and Louise Charron – who also happen to be women; and as a result, with 4 of the 9 Justices on the Supreme Court now being women, we have the most gender-balanced Supreme Court in the world.

In all judicial appointments, merit is the overriding criterion for appointment; excellence is the standard; but I am delighted also that the appointments reflect the diversity of this country, and our respect for that diversity.

We recently tabled in Parliament a comprehensive proposal for the reform of the appointments process to the Supreme Court which constitutes the first ever reform of its kind, and which I would like to now share with you.

a) This appointments proposal is premised on several main principles:

First is the merit principle, where the overriding objective of the appointments process is to ensure that the best candidates are appointed, based on the merit criteria I described last year, and reflecting to the extent possible the diversity of Canadian society.

The second principle is the Constitutional framework, recognizing that the constitutional authority for the appointment of Supreme Court judges is vested in the Governor-in-Council and is a non-delegated power.

Third is the promotion and protection of the independence of the judiciary and the integrity of the Supreme Court of Canada and the court system generally.

The fourth principle is enhanced transparency and accountability by ensuring that the appointments process is publicly known, understood and engaged. In this connection the process will - for the first time - be administered by the Commissioner for Federal Judicial Affairs.

The fifth principle is that of enhanced Parliamentary input as a means also to contribute to the transparency and accountability of the advisory committee.

The sixth principle is provision for enhanced provincial input.

The final principle is to allow for greater public input and involvement.

b) The Four Steps in the Supreme Court of Canada Appointments Process

In terms of the specifics of the process itself, there would be four sequenced stages.

In the first stage, as Minister of Justice, I would engage in a comprehensive consultation process as reflected in the protocol of persons to be consulted that I have already made public. These would include the Chief Justice of the Supreme Court of Canada; the Chief Justices of the province or region from which the vacancy is to be filled; the provincial Attorneys General; the President of

the Canadian Bar Association; representatives of the provincial law societies; and a formal process, administered for the first time, to invite recommendations from the public. From this range of consultations, I would prepare an initial list in the range of five to eight candidates, depending on the province or region, who would be assessed by an Advisory Committee established for that purpose.

At the second stage, an Advisory Committee would be established to engage in a consultation and evaluation process, and to assess the candidates based on a written mandate from the Minister of Justice and established criteria as contained in the public protocol. The Advisory Committee would then provide the Minister with a short list of three candidates, along with a commentary on the strengths and weaknesses of each candidate on the short list.

At the third stage, the Minister of Justice and the Prime Minister would complete any further consultations as considered necessary, and the Prime Minister would recommend a candidate to the Governor in Council.

Finally, the Minister would appear before the Justice Committee as soon as possible after the appointment to explain the process and the personal and professional qualities of the candidate selected, as I did before the *ad hoc* committee last summer.

c) Immediate steps underway for next vacancy

In terms of this process as above described, we are now moving ahead to implement it. As you know, Mr. Justice John Major has publicly announced that he will be resigning from the Supreme Court as of December 25th. Accordingly, I have now embarked on the consultation process, and we are taking the necessary steps to establish the Advisory Committee that will be used to fill the resulting vacancy. The composition of the Advisory Committee will include: a member of Parliament from each of the recognized parties; a retired judge nominated by the Canadian Judicial Council; and, from the region where the vacancy arises, a nominee of the Provincial Attorneys General, a nominee of the Law Societies, and two prominent Canadians who are neither lawyers nor judges. A new Advisory Committee will be formed each time a Supreme Court vacancy occurs.

This, then, is our proposal for the reform of the Supreme Court appointments process, and I am very appreciative of the contributions of key participants such as the CBA to the reform process.

d) Improvements to the Federal Judicial Appointments Committee process

We have also been moving forward in considering reforms to the appointments process for other federally appointed judges. I have been reflecting on this for some time – even during my time as a law professor – but my thinking on this has been triggered by the work that has gone into the Supreme Court process and consultations in that regard.

More recently though, as you are aware, calls for reform of the process have been raised in response to some of the more inflammatory allegations in the context of the Gomery Inquiry.

May I simply repeat and reaffirm what I have said before in response to allegations that the appointments process is tainted by political considerations: political affiliation is neither a consideration nor a disqualifier for judicial office. The sole criteria for appointment are merit based considerations.

Admittedly, many highly qualified lawyers who have been actively involved in public affairs may later seek judicial office. But the involvement in public issues is to be welcomed, not discouraged. Indeed, to exclude excellent and engaged professionals from consideration for judicial office would not only limit the available pool of candidates for both political and judicial office but it also might chill participation in the democratic process itself.

That said, I recognize that some legitimate concerns with the current process have been raised by members of the legal community and media commentators. I take these comments and expressions of concern very seriously. I have, in fact, said that though I believe the current process is sound in principle, I accept that it may be improved in practice.

Accordingly, may I turn now to the initiatives that I will be taking to improve the transparency and accountability of the judicial advisory committees to ensure that the judicial appointments process is functioning as independently, effectively, and fairly as it can.

In arriving at these initiatives, I sought the advice of the Chairs of the various provincial and territorial judicial advisory committees, since it is they who have the experience on the ground in terms of how the process really operates in practice. I met with all the Chairs collectively in June. They have provided me with some very valuable feedback and suggestions for enhancing the transparency of and confidence in the process.

First, a Code of Conduct is being developed which will provide clear professional direction to all Committee members in relation to their sensitive and important responsibilities. An important component of this code will govern the manner and content of consultations undertaken by members individually and collectively.

Second, I will publicly release not only this Code of Conduct but also, for the first time, the mandate letter and the guidelines that govern advisory committee members' participation in the process. This will provide a better and more detailed public appreciation of the way in which information with respect to the merit criteria is gathered and assessed by the Committee members. It will also demonstrate the careful steps that are taken to preserve confidentiality, which is central to the process.

Thirdly, I will ask the Commissioner for Federal Judicial Affairs to publish, on an annual basis, two important sets of information: 1) a current list of the members of the Judicial Appointments Committees; and 2) information about applications for judicial office, including the total number of applications, as well as the number of candidates who are recommended and highly recommended.

These are the immediate steps that I will take to reform the appointments process for the federal judiciary.

In the longer term, I will continue my consulting with experts to seek their views on additional ways to improve the process. Given the pivotal role of the CBA in the establishment of the process in the first place, your participation and support will be critical to my efforts in this regard. I remain confident that, at a minimum, an improved public understanding of the judicial appointments committee process will do much to dispel the criticism and innuendo that has been increasingly directed towards judges in the last few months.

3 – Building an International Justice System for the 21st Century

May I turn now to a third emergent priority – and that is our role in building an international justice system for the 21st Century, and to do so by helping to build national justice systems -- including respect for the independence of the judiciary -- one by one by one.

Accordingly, a major initiative under our Justice Agenda involves international legal cooperation and the building of national justice systems as a basis for the establishment of an international justice system for the 21st century. This has included bilateral cooperation and assistance in the building of national justice systems in such diverse countries and cultures as Indonesia, the largest Muslim democracy in the world.

I would like to mention now an exciting new project which we call ME-4. It began during my official visit last winter to the Middle East – to Egypt, Israel, the Palestinian Authority and Jordan – otherwise known as ME-4 – where I shared with my Ministerial counterparts, as well as the Chief Justices, Speakers of the Parliaments, and representatives of civil society, the priorities on our Justice Agenda. In particular, our discussions focussed on the importance of building a national justice system organized around the promotion of democracy, human rights, good governance and the rule of law.

I am delighted to report that the Justice Ministers from the ME-4 have agreed to participate together in a justice dialogue. This is the first time that these four Ministers will have come together in a forum that we will host in Ottawa early in 2006.

As well, we are engaged in a training program on the independence of the judiciary with the Palestinian Authority, and here I am delighted to report that the Chief Justice of the Palestinian Supreme Court, Zouhair Sourani, and the Deputy Chief Justice of the Court, Assad Mubarak, will also be visiting Canada this fall.

May I close by inviting you once again to be at the forefront of the struggle for the public good, for our legal profession is not simply a business; it is a calling. It is more than a vocation; it is a public trust. Each one of us then must see himself or herself as a private Attorney General with an indispensable role to play in the pursuit of justice. Each one of us has the capacity to do something every day on the part of some victim of discrimination and disadvantage somewhere. Each one of us can help build a society that is just, humane and compassionate.

Thank you.

Date Modified: **2008-04-14**